UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Captain ZACHARY T. LAWRENCE
United States Army, Appellant

ARMY 20130249

Headquarters, Fort Campbell
Steven E. Walburn, Military Judge
Colonel Jeff A. Bovarnick, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Robert H. Meek, III, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Major John K. Choike, JA; Captain Robyn M. Chatwood, JA (on brief).

23 April 2015

SUMMARY DISPOSITION

LIND, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of willful disobedience of a superior commissioned officer and three specifications of conduct unbecoming an officer and gentlemen in violation of Articles 90 and 133, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 890, 933 (2012). The military judge sentenced appellant to a dismissal, three months confinement, and forfeiture of all pay and allowances. The convening authority approved only so much of the sentence as provided for a dismissal, sixty days confinement, and forfeiture of all pay and allowances.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises one assignment of error and several matters personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which we find to be without merit. However, after review of the entire record, we find a substantial basis in law

and fact to question appellant's plea of guilty to a portion of Specification 2 of Charge II and will take corrective action in our decretal paragraph.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will only be set aside if we find a substantial basis in law or fact to question the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The court applies this "substantial basis" test by determining whether the record raises a substantial question about the factual basis of appellant's guilty plea or the law underpinning the plea. *Id.*; *see also* UCMJ art. 45(a); Rule for Courts-Martial 910(e); *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012) ("It is an abuse of discretion for a military judge to accept a guilty plea without an adequate factual basis to support it . . . [or] if the ruling is based on an erroneous view of the law.").

A providence inquiry into a guilty plea must establish that the accused believes and admits he is guilty of the offense and that the factual circumstances admitted by the accused objectively support the guilty plea. *United States v. Garcia*, 44 M.J. 496, 497-98 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). "If an accused sets up matter inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (quoting *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011)) (internal quotation marks omitted); *see also* UCMJ art. 45(a). "A military judge abuses his discretion if he neglects or chooses not to resolve an inconsistency or reject the inconsistent or irregular pleading." *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013) (quoting *United States v. Hayes*, 70 M.J. 454, 457-58 (C.A.A.F. 2012)).

"In determining on appeal whether there is a substantial inconsistency, this [c]ourt considers the 'full context' of the plea inquiry, including [a]ppellant's stipulation of fact." *Goodman*, 70 M.J. at 399 (quoting *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995)). "This court must find 'a substantial conflict between the plea and the accused's statements or other evidence' in order to set aside a guilty plea. The 'mere possibility' of a conflict is not sufficient." *Hines*, 73 M.J. at 124 (quoting *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012)).

Specification 2 of Charge II charged appellant with the following misconduct:

> In that [appellant] did, at or near Fort Campbell, Kentucky, between on or about 10 April 2012 and on or about 24 May 2012, wrongfully and dishonorably engage in an inappropriate relationship with Specialist [NB] and did wrongfully and dishonorably harass her through a continuing course of conduct, to wit: *going to her house*

> *unannounced and uninvited*, sending her abusive text messages, and calling and threatening her, which conduct was unbecoming an officer and a gentleman.

(Emphasis added).[1]

The stipulation of fact and providence inquiry establish appellant and Ms. NB were in a romantic relationship between on or about 10 April 2012 and 24 May 2012. Ms. NB had a copy of appellant's house key because she would take care of his dog when appellant was out in the field. On or about 20 May 2012, Ms. NB invited appellant to go canoeing with her and some friends. When appellant responded by telephone, Ms. NB and her friends were already at the canoe rental. Ms. NB and appellant had a fight over appellant's late response.

During the providence inquiry, appellant informed the judge that when he and Ms. NB were speaking on the phone at the canoe rental, Ms. NB told him: "if you want your key back, I'll be home later. You can come by and get it." Appellant stated that he went to Ms. NB's house to pick up his key from her that same day. Appellant went on to tell the judge: "[h]owever, I was not invited the time that I showed up, and it was unannounced when I showed up to get---return---to get my key back." The stipulation of fact also states that appellant "went to Ms. [NB's] house uninvited on one occasion" and that "[a]fter [Ms. NB] came home [on 20 May 2012], he wanted his house key, and he showed up at Ms. [NB's] house, uninvited . . . ."

The judge did not attempt to reconcile the inconsistency between appellant's admission that Ms. NB had given him permission to come to her house later that day to pick up his key and appellant's subsequent admission that his presence at Ms. NB's house later that day was somehow "unannounced and uninvited." *See Hines*, 73 M.J. at 124. In light of this unresolved, factual inconsistency, we will set aside that portion of appellant's plea of guilty to wrongfully and dishonorably harassing Ms. NB by "going to her house unannounced and uninvited." *See Schell*, 72 M.J. at 345.[2]

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[1] Appellant began dating Specialist (SPC) NB while she was pending expiration of her term of service (ETS) from the Army. During the charged period, SPC NB was discharged and became Ms. NB. We will refer to SPC NB as Ms. NB for the remainder of this opinion.

[2] As a result of our disposition of this issue, we need not decide whether under the circumstances of this case appellant was on fair notice that his going to the home of a person with whom he was having a romantic relationship "unannounced and

(continued . . .)

CONCLUSION

We affirm only so much of Specification 2 of Charge II as provides:

> In that Captain Zachary T. Lawrence, U.S. Army, did, at or near Fort Campbell, Kentucky, between on or about 10 April 2012 and on or about 24 May 2012, wrongfully and dishonorably engage in an inappropriate relationship with Specialist NB and did wrongfully and dishonorably harass her through a continuing course of conduct, to wit: sending her abusive text messages, and calling and threatening her, which conduct was unbecoming an officer and a gentleman.

The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the error noted, the entire record, and applying the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and the factors set forth in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the error noted. The sentence is AFFIRMED.

Judge KRAUSS and Judge PENLAND concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

(. . . continued)
uninvited" amounted to conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ. *See generally United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) ("Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction.").